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# • STILL DOING THE TWO-STEP: ONTARIO'S DIVISIONAL COURT IN *KUIPER* CONFIRMS A TWO-STEP APPROACH TO COMMON ISSUES ON CERTIFICATION •

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**The** Ontario Divisional Court's decision in *Kuiper v Cook (Canada) Inc*[1] offers the latest appellate determination on a debate about what, precisely, the "some basis in fact" standard requires of class action plaintiffs who are seeking to demonstrate that their claims raise "common issues".

A three-judge panel unanimously determined in *Kuiper* that despite recent uncertainty in the jurisprudence, a "two-part test still governs the commonality inquiry" on certification. That is, a proposed representative plaintiff must show some basis in fact that both: (1) the proposed common issue actually exists, and (2) the proposed issue can be answered in common across the entire class. In reaching this conclusion, the Divisional Court rejected the contention that only the second requirement was a requisite for certification of a proposed common issue.

## BACKGROUND

*Kuiper* is a products liability class action. The products at issue relate to certain implantable inferior vena cava filters, which were designed to trap blood clots in order to address potentially fatal pulmonary embolisms. The underlying claims advanced two principal allegations: (1) defective design; and (2) breach of the duty to warn.

At certification, the plaintiffs' inability to satisfy the commonality requirement in respect of design

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defect and duty to warn claims was fatal to their bid to certify the action as a class proceeding.

On appeal to the Divisional Court, the plaintiffs argued, among other things, that the motion judge erred in applying a two-part analysis in considering whether there was some basis in fact for the proposed common issues, as opposed to a one-part test asking only whether the proposed common issues could be answered in common across the entire class. The plaintiffs asserted that they were not required to lead any evidence at certification that the alleged acts actually occurred. The Divisional Court disagreed, and confirmed that the "two-part test still governs the commonality inquiry".[2]

## TRACING THE EVOLUTION OF THE "SOME BASIS IN FACT" STANDARD FOR COMMON ISSUES

Despite the fact that the resolution of common issues is "the heart of a class proceeding",[3] there continues to be somewhat of a push-and-pull among courts as to the appropriate application of the "some basis in fact" test for commonality.

### *A) Hollick v. Toronto (City)*

The genesis of the "some basis in fact" standard for class certification is the Supreme Court's 2001 decision in *Hollick v. Toronto (City)*, where McLachlin CJC, for the Court, wrote that there must be "some basis in fact to support the certification order":

> … the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the [*Class Proceedings*] *Act*, other than the requirement that the pleadings disclose a cause of action.[4]

*Hollick* was a proposed environmental class action, in which putative class members living in the vicinity of a Toronto landfill complained about the noise and physical pollution emanating from the site. Although the case was not certified for other reasons, the Supreme Court did find that the plaintiff had "met his evidentiary burden" for establishing

commonality. It observed that the evidentiary record contained "some 115 pages of complaint records" from "within the specified boundaries" contemplated by the class definition, and commented that "[i]t is sufficiently clear … that many individuals besides the [plaintiff] were concerned about noise and physical emissions from the landfill". As such, the plaintiff had successfully "shown a sufficient basis in fact to satisfy the commonality requirement".[5]

The complaint records in *Hollick* did more than just demonstrate that there was more one person who shared an interest in the alleged common issues raised in the case. The records also provided an evidentiary basis for the plaintiff's assertion that there was, in fact, an "issue" with noise and physical pollution emanating from the landfill. Put differently, there was a basis in the evidence that the asserted common issue *actually existed*, plus a basis for believing the issue could be answered in common across the proposed class (*i.e.*, the two-part inquiry for commonality). While *Hollick* endorsed the proposed common issues, the Supreme Court also counselled that "the certification stage is decidedly not meant to be a test of the merits of the action".[6]

Unsurprisingly, since *Hollick*, a number of judicial pronouncements have added gloss on what "some basis in fact" requires a plaintiff to demonstrate at certification in support of the proposed common issues. Commentators have nevertheless observed that the precise meaning and application of the "some basis in fact" standard remains elusive in practice.[7]

### *B) Fulawka v. Bank of Nova Scotia*

The Court of Appeal for Ontario's 2012 decision in *Fulawka* appeared to come down definitively in favour of a two-part commonality inquiry.[8] It held that "[w]hile the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities, there must nevertheless be some evidentiary basis indicating that the common issue exists beyond a bare assertion in the pleadings".[9] The takeaway from *Fulawka*, in this regard, is that the mere assertion of an issue that has class-wide applicability is not sufficient to make the issue a "common issue", as that term has been judicially interpreted. Rather, there must be some basis in the evidence that there really is an "issue".

Support for the two-step commonality inquiry can also be drawn from the oft-cited summary of the principles governing the common issues requirement in *Singer v Schering-Plough Canada Inc*.[10] There, Strathy J. (as he then was) endorsed propositions that included that:

> A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis…
>
> …
>
> C: There must be a basis in the evidence before the court to establish the existence of common issues… the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.
>
> …
>
> G: With regard to common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent…
>
> …
>
> I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis…[11]

The catalogue of commonality propositions noted above confirms the need for some factual basis, anchored in the evidentiary record on the certification motion, which underpins a proposed common issue. It also illustrates that, for certain types of proposed common issues that otherwise have an inherent individuality to them – issues of causation and loss – the court needs to be satisfied that there is some basis in fact for determining these issues on a class-wide basis in a workable manner.

### *C) Pro-Sys Consultants v. Microsoft Corporation*

In 2013, the Supreme Court of Canada decided a trilogy of class action cases, including *Pro-Sys Consultants Ltd. v. Microsoft Corporation*.[12] *Pro-Sys* was a competition case, and the plaintiffs sought to certify a class made up of the ultimate consumers ("indirect purchasers") who purchased products that were allegedly subject to an unlawful overcharge. The Supreme Court was invited to revisit the "some basis in fact" standard. It affirmed that standard, and in so doing made a key comment that forms the basis for some courts subsequently treating the commonality inquiry as having one step, instead of two steps:

> The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight"…
>
> [I]t has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" … nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> … [T]here is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage …
>
> …
>
> The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.[13]

The Supreme Court's observation that the only factual evidence required to support commonality is evidence "establishing whether these questions are common" seems, at first blush, to eliminate the need for a plaintiff to lead any evidence establishing some factual basis for the issues themselves.

However, *Pro-Sys* also suggested that for proposed common issues inquiring into whether class members suffered loss, certification of such issues required expert evidence that was "sufficiently credible or plausible" so as to establish class-wide loss. This methodology could not be "purely theoretical or hypothetical" and had to be "grounded in the facts of the particular case in question". Implicit in this pronouncement is that there had to be a factual foundation – as opposed to a purely theoretical foundation – for the loss-related "issue" itself, not just a basis for concluding the loss-related issue had class-wide application.[14]

Still, following *Pro-Sys*, it was far from clear whether – with the possible exception of loss-related common issues – plaintiffs pursuing certification of common issues were required to do anything more than posit an "issue" to be resolved in the class action, and support the asserted issue with evidence that the issue had class-wide reach.

## ONE OR TWO STEPS? DEVELOPMENTS IN ONTARIO FOLLOWING PRO-SYS

It did not take long for class counsel in Ontario to embrace the possibility that *Pro-Sys* had diminished the plaintiff's evidentiary obligation for establishing some basis in fact for proposed common issues. Invariably, some courts in the Province followed suit.[15]

In 2017, one prominent class actions judge observed that it was "time to retire the two step approach and focus only on class-wide commonality."[16] The decision in which this comment was made, *Kalra v. Mercedes Benz Canada Inc*, involved allegations that certain Mercedes-Benz diesel automobiles contained a "defeat device" that manipulated the emissions control system of the vehicle. At the time

of certification, there had been no product recall orders or court decisions against the manufacturer on the issue; investigations into the emissions control system were ongoing in both the United States and Europe. In discarding the two-step commonality inquiry in that case in favour of a one-step approach, the *Kalra* court made the following observation on why requiring some factual evidence that a proposed defeat device common issue actually exists was potentially problematic:

> But how does the plaintiff here provide some evidence that the defeat device actually exists? Unless he is an experienced automotive engineer with access to his own personal automobile hoist and emission testing technology, the existence of an alleged defeat device buried as it is in the complexities of a modern automobile engine is probably not something about which the plaintiff could ever provide meaningful evidence. The most the plaintiff can say, as he does here, is "the vehicle failed the emissions test" (not really evidence about a defeat device that stops working below 10 degrees Celsius) and "[i]f I had been aware of the defeat device, I would not have purchased the vehicle" (again not really evidence that such a defeat device actually exists).[17]

Just a few short months after *Kalra*, Ontario's Divisional Court disagreed with the one-step approach in *Batten v. Boehringer Ingelheim (Canada) Inc.* It cited *Fulawka* in support of the need for "some evidentiary basis to show that the common issue exists beyond a bare assertion in the pleadings".[18] The Divisional Court, referencing *Pro-Sys*, did not explicitly purport to resolve the one-step versus two-step commonality debate and instead commented that *Pro-Sys* did not "directly address a one stage versus a two stage inquiry".[19]

Notwithstanding the Divisional Court's decision in *Batten*, some motion judges hearing certification motions continued to maintain that *Pro-Sys* established a one-step commonality inquiry. In *Kaplan v. Casino Rama Services Inc*, a decision from 2019, the motion judge observed that while *Batten* "resuscitated" the two-step test, he still believed such a test was a "conflict" with *Pro-Sys*.[20] In another 2019 decision, a different motion judge also appeared to endorse a one-step test, citing *Kalra* and noting that the defendant in that case "rightly acknowledges" that the obligation of the plaintiff is "only … to show some evidence of commonality – that is, some evidence that the proposed common issue applies class-wide."[21]

## THE DECISION IN *KUIPER* – THE DIVISIONAL COURT CONFIRMS THE TWO-STEP APPROACH

The *Kuiper* decision squarely addresses the two-step versus one-step debate that has been brewing since *Pro-Sys*. While the Divisional Court only devotes ten paragraphs to the issue, it unambiguously holds that "the weight of judicial and appellate authority is that the two-part test still exists".[22]

The Divisional Court explicitly examines the Supreme Court's comment in *Pro-Sys* that "the factual evidence required at [the certification] stage goes only to establishing whether these questions are common to all the class members". It situated that comment within the Supreme Court's discussion about whether the whole class suffered class wide damage, injury or loss, and reasoned that, in that context, the reference to a "common" issue was used "in the sense that all class members had to have some basis in fact to say that they all suffered the loss and therefore have a genuine interest in the litigation's resolution".[23]

However, the reasoning in *Kuiper* has gaps. The Divisional Court asserts that the Supreme Court's most recent class action decision, *Pioneer Corp. v. Godfrey*, provides support for the two-step approach because the Supreme Court upheld "the motion judge's holding that the two-step test applied".[24] Close inspection of the motion judge's decision in *Godfrey v. Sony Corporation*, however, reveals that the motion judge began his commonality inquiry by citing *Pro-Sys* for the proposition that

> … [w]hile the plaintiff must show "some basis in fact" to satisfy the commonality requirement, this only requires evidence establishing that these questions are common to the class.[25]

What the Supreme Court endorsed in *Pioneer* was not the motion judge's adoption of a two-step inquiry

for all common issues; rather, it was the motion judge's approach to certifying the loss and gain-related common issues, including the motion judge's evaluation of the plausibility of those common issues. Since *Pro-Sys*, it has been clear that the plausibility of loss-related common issues and the expert evidence supporting them is scrutinized so as to ensure there is a basis in fact supporting both the *existence* of loss and the potential *class-wide scope* of the loss.

Despite this gap, we are of the opinion that *Kuiper* reached the correct conclusion and properly confirms that all proposed common issues need an evidentiary foundation supporting both the existence of the issue, and that the issue can be answered in common across the entire class. The following statement of the Court of Appeal for Ontario in *McCracken v. Canadian National Railway Company* remains apposite today:

> A core of commonality either exists on the record or it does not. In other words, commonality is not manufactured through the statement of common issues. The common issues are derived from the facts and from the issues of law arising from the causes of action asserted by class members and not the other way around.[26]

## UNDERSTANDING THE "SOME BASIS IN FACT" STANDARD FOR COMMON ISSUES

A proposed common issue that is not underpinned by some evidentiary basis supporting a conclusion that two or more class members share the actual "issue" is not an "issue" worthy of certification. If, to use the words in *Pro-Sys*, class certification is to be a "meaningful screening device", it cannot be enough for a proposed representative plaintiff to postulate an issue in the abstract that it would like to see resolved, and then focus only on demonstrating that all class members could benefit from the issue's determination. To give an example, harkening back to the *Kalra* decision, if the proposed representative plaintiff is unable to marshal some evidentiary basis that a "defeat device" actually exists in the cars of two or more class members, why should they be permitted to certify a common issue posing this very question? It cannot be enough to simply assert, in the pleadings, that the defeat device exists. Such a bare assertion runs contrary to *Fulawka*.

The need to show some basis in fact for both the existence and class-wide reach of a proposed issue ensures that the certified common issues are not artificial. The requirement for "some" evidence means that the evidentiary record needs to be exhaustive, and it certainly does not demand a record "upon which the merits will be argued".[27] The purpose is to ensure that only appropriate common issues – those for which the two-step test is met – are prosecuted as part of a class action.[28] As an example, a proposed common issue alleging a defendant's breach of contract requires some evidentiary basis that contracts exist with the class members, that they contain the same or similar provision alleged to be breached, and that the defendants engaged in conduct that is alleged to breach that provision. It is a reversible error for a judge to assess the evidence at the certification motion to determine whether the contract was actually breached.[29]

*Kuiper* is a clear and welcome statement from an intermediate appellate court that the two-step commonality inquiry is alive and well. While the Court of Appeal for Ontario may yet weigh in and provide explicit guidance on this debate, a retreat to a one-step commonality inquiry – where all that matters is whether the common question proposed has class-wide import – risks an approach where class actions are pursued and certified on tenuous pretenses. As *Kuiper* quite rightly observes, while the "some basis in fact" standard for a common issue is low, "it is not 'subterranean'".[30]

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1 *Kuiper v Cook (Canada) Inc,* [2020] O.J. No. 57, 2020 ONSC 128 (Div Ct) [*Kuiper*].

2 *Kuiper*, para 36.

3 *Campbell v Flexwatt Corp*, [1997] B.C.J. No. 2477, 44 BCLR (3d) 343 (CA), at para 52.

4 *Hollick v Toronto (City)*, [2001] S.C.J. NO. 67, 2001 SCC 68 [*Hollick*], at para 25.

5 *Hollick*, at para 26.

6 *Hollick*, at para 16.

7 See *e.g.*, M. Cullity, "Certification in Class Proceedings – The Curious Requirement of 'Some Basis in Fact'" (2011 51 Can Bus LJ 407; B. Kain, "Developments in Class Actions Law: the 2013-2014 Term – The Supreme Court of Canada and the Still-Curious Requirement of 'Some Basis in Fact'" (2015) 68 SCLR (2d) 77.

8 *Fulawka v Bank of Nova Scotia*, [2012] O.J. No. 2885, 2012 ONCA 443 [*Fulawka*].

9 *Fulawka*, at para 79. [Emphasis added.]

10 *Singer v Schering-Plough Canada Inc*, [2010] O.J. No. 113, 2010 ONSC 42 [*Singer*].

11 *Singer*, at para 140 [citations omitted, emphasis added].

12 *Pro-Sys Consultants Ltd v Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57 [*Pro-Sys*].

13 *Pro-Sys*, at paras 103-104, 110. [Emphasis added.]

14 *Pro-Sys*, at para 118.

15 See *e.g.*, *Hodge v Neinstein*, [2017] O.J. No. 3109, 2017 ONCA 494, para 113 (Court of Appeal for Ontario noting "the factual evidence [at certification] goes only to establishing whether the questions are common to all class members", citing *Pro-Sys*.)

16 *Kalra v Mercedes Benz Canada Inc*, [2017] O.J. No. 3380, 2017 ONSC 3795 [*Kalra*], at para 46.

17 *Kalra*, at para 43.

18 *Batten v Boehringer Ingelheim (Canada) Ltd*, [2017] O.J. No. 5673, 2017 ONSC 6098 (Div. Ct.) [*Batten*], at paras 14-15.

19 *Batten*, para 15.

20 *Kaplan v Casino Rama Services Inc*, [2019] O.J. No. 2385, 2019 ONSC 2025, at paras 53-54 (the motion judge decided to apply the more inclusive two-step test "out of an abundance of caution", noting that the one-step versus two-step issue would be "clarified on appeal one way or another").

21 *Cirillo v Ontario*, [2019] O.J. No. 2627, 2019 ONSC 3066, at para 69.

22 *Kuiper*, at para 29.

23 *Kuiper*, at para 32.

24 *Kuiper*, at para 35.

25 *Godfrey v Sony Corporation*, [2016] B.C.J. No. 979, 2016 BCSC 844, at para 141.

26 *McCracken v Canadian National Railway Company*, 2012 ONCA 445, [2012] OJ No 2884 [*McCracken*], at para 132.

27 *McCracken*, at para 76.

28 *Fehr v Sun Life Assurance Company of Canada*, 2018 ONCA 718, [2018] OJ No 4513 [*Fehr*], at para 87.

29 *Fehr*, at para 86.

30 *Kuiper*, at para 27.